



POSTAL REGULATORY COMMISSION

39 CFR Parts 3006 and 3011

[Docket No. RM2023-6; Order No. 6530]

RIN 3211-AA35

Non-public Materials

AGENCY: Postal Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Commission adopts amendments to rules relating to non-public materials and the Freedom of Information Act (FOIA).

DATES: Effective [INSERT 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For additional information, Order No. 6530 can be accessed electronically through the Commission's website at <https://www.prc.gov>.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202-789-6820.

SUPPLEMENTARY INFORMATION:

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I. Background

On March 3, 2023, the Commission issued a notice of proposed rulemaking that proposed amendments to its rules to exempt non-public materials submitted to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) from the rules in 39 CFR part 3011, and amendments to

certain rules pertaining to FOIA requests in 39 CFR part 3006.¹ The Commission initiated Docket No. RM2023-6 to consider the proposed amendments to 39 CFR parts 3006 and 3011, invited interested persons to submit comments, and appointed a Public Representative. Order No. 6451 at 19. On April 6, 2023, the Commission received comments filed by four parties: the Postal Service,² the U.S. Chamber of Commerce (COC),³ the Lexington Institute (LI),⁴ and the Public Representative.⁵

II. Basis and Purpose of Final Rules

All four commenters support the amendments proposed in Order No. 6451. See Postal Service Comments at 2; COC Comments at 2; LI Comments at 2; PR Comments at 1. In addition to supporting the proposed amendments, they have various suggestions for the Commission to consider for the final rules. After reviewing the comments, the Commission adopts the amended rules as proposed in Order No 6451, with revisions in the final § 3006.30(e) to provide greater clarity with respect to the procedures for FOIA requests for records submitted by a person other than the Postal Service.

The Postal Service suggests that the Commission expand the scope of the final rules beyond the 39 U.S.C. 407(b)(2)(A) context to include non-public materials submitted to the Commission in Executive Branch interagency deliberations generally and in proceedings to which the Commission's *ex parte* rules do not apply. Postal Service Comments at 3-7. The Commission declines to do so because Postal Service's suggested expansion is beyond the scope of

¹ Notice of Proposed Rulemaking Regarding Materials Provided to the Commission in Connection With Activities Under 39 U.S.C. 407(b)(2)(A), March 3, 2023, at 2 (Order No. 6451).

² Comments of the United States Postal Service, April 6, 2023 (Postal Service Comments).

³ Comments of U.S. Chamber of Commerce, April 6, 2023 (COC Comments).

⁴ Comments of the Lexington Institute, April 6, 2023 (LI Comments).

⁵ Public Representative's Comments Concerning Notice of Proposed Rulemaking, April 6, 2023 (PR Comments).

this rulemaking. The scope of this rulemaking as articulated throughout Order No. 6451 is narrowly focused on the non-public materials provided to the Commission in connection with the coordination activities under 39 U.S.C. 407(b)(2)(A). The Commission notes it could further amend the regulations in the future if necessary, and notes that any interested person may file a petition requesting that the Commission consider such a rule change. 39 CFR 3010.201(b)(1).

The Public Representative suggests that there may be less formal circumstances in the 39 U.S.C. 407(b)(2)(A) context, in which non-public materials could be construed as being informally requested by the Commission from the Postal Service, a scenario that the proposed rulemaking does not cover. PR Comments at 5. The Commission notes her concern is hypothetical in nature and she does not present any concrete improvement in the final rules. The Commission further takes note of her suggestion that the Commission could further amend the regulations in the future if necessary. *See id.* at 5.

COC suggests that the Postal Service is not a participant in the coordination activities under 39 U.S.C. 407(b)(2)(A) (in contrast with their participation in the liaison activities under 39 U.S.C. 407(b)(2)(D)) and no materials submitted by the Postal Service can be considered to be 39 U.S.C. 407(b)(2)(A) materials. COC Comments at 2-3. The Commission declines to consider this issue in this docket. Potential distinctions between 39 U.S.C. 407(b)(2)(A) and 39 U.S.C. 407(b)(2)(D) are issues beyond the scope of this rulemaking, and adopting the Commission's proposal does not rest upon differentiating between them. Regardless, the Commission reiterates that its proposal (and the underlying legal authority and rationale articulated for adopting it) encompass materials provided to the Commission *in connection with* activities

under 39 U.S.C. 407(b)(2)(A). See *generally* Order No. 6451. Accordingly, the Commission rejects the narrow interpretation that the proposed rules should not apply to any materials submitted by the Postal Service to the Commission *in connection with* the coordination activities under 39 U.S.C. 407(b)(2)(A).

COC and LI both raise concerns for the possibility of decreased transparency. COC Comments at 4; LI Comments at 2. The Commission notes that their concern is hypothetical in nature at this time. In addition, they do not specify any information or materials that are transparent now under existing rules but would no longer be transparent when the proposal is implemented. Moreover, they do not suggest any concrete rule changes to address their transparency concern. The Commission believes that the crucial and present need to ensure the free flow of information in the interagency deliberative process outweighs any hypothetical reduced transparency. In addition, the pathway through FOIA requests under 39 CFR part 3006 remains open. Finally, proposed § 3011.100(c)(3) provides that if any non-public materials submitted to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) are also provided via one of the enumerated four methods, then that production responsive to a subpoena or filing would be subject to the requirements in 39 CFR part 3011, including the access and public disclosure rules in 39 CFR part 3011, subparts C and D. Order No. 6451 at 11-12.

The Public Representative requests two clarifications for the proposed amendments in the FOIA rules in 39 CFR part 3006. First, she requests the Commission to clarify whether the proposed § 3006.30(d)(1) and (e)(1) apply to all records (both public and non-public) submitted by the Postal Service or any other person, respectively, and not merely to non-public records as stated in the existing regulation. PR Comments at 6. The Commission clarifies that the

proposed § 3006.30(d)(1) and (e)(1) apply to all records (both public and non-public), because FOIA applies to all records and not merely non-public records. See 5 U.S.C. 552(f)(2)(A); 39 CFR 3006.2(b). The Commission notes that the existing heading for § 3006.30(e) (“Requesting a record submitted under seal by a person other than the Postal Service”) will no longer be accurate for the amended rules. Therefore, in the final rules, the Commission shall revise the heading for final § 3006.30(e) to delete the phrase “under seal.”

Second, the Public Representative requests the Commission to clarify whether the notification procedures in the existing § 3006.70(b)-(d) apply to requests for all records (designated as non-public or otherwise) submitted by a person other than the Postal Service, or whether the seemingly more limited notification process in the proposed § 3006.30(e)(1) apply only to requests for records not designated as non-public. PR Comments at 6-7. The Commission clarifies that the notification procedures in the existing § 3006.70(b)-(d) apply only to requests for records designated as non-public, as denoted by the consistent reference to “non-public materials” throughout the existing § 3006.70. The Commission further clarifies that the more limited notification process in the proposed §3006.30(e)(1) is intended to apply only to requests for records submitted by a person other than the Postal Service in instances in which § 3006.70 does not apply. Proposed § 3006.30(e)(1) does not overlap with the existing § 3006.70(b)-(d), because § 3006.30(e)(1) and 3006.70(b)-(d) come into operation only after the Commission determines that referral to another Federal agency under newly added § 3006.35(b) is not appropriate, and they detail procedures for two different types of FOIA requests (existing § 3006.70 pertains to FOIA requests for materials designated as non-public, and proposed § 3006.30(e)(1) pertains to FOIA requests in all other instances). In the final §

3006.30(e)(1), the Commission amends the rule to clarify the bifurcated procedures for these two types of FOIA requests if the Commission determines that referral to another Federal agency under § 3006.35(b) is not appropriate. In addition, in the final § 3006.30(e)(1)(ii), the Commission finds it reasonable to provide an identical deadline for the submitter to respond to the FOIA request in these circumstances as it does in existing § 3006.70(c), *i.e.*, within seven days of the date of the notice.

IV. Final Rules

The Commission adopts final rules to exempt non-public materials submitted to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) from the rules in 39 CFR part 3011, and to revise certain rules pertaining to FOIA requests in 39 CFR part 3006.

By the Commission.

Erica A. Barker,

Secretary.

List of Subjects

39 CFR Part 3006

Administrative practice and procedure, Freedom of information, Reporting and recordkeeping requirements.

39 CFR Part 3011

Administrative practice and procedure, Confidential business information.

For the reasons stated in the preamble, the Commission amends chapter III of title 39 of the Code of the Federal Regulations as follows:

PART 3006—PUBLIC RECORDS AND FREEDOM OF INFORMATION ACT

1. The authority citation for part 3006 is revised to read as follows:

Authority: 5 U.S.C. 552; 39 U.S.C. 407, 503, 504.

2. Amend § 3006.30 by revising paragraphs (d) and (e) to read as follows:

§ 3006.30 Relationship among the Freedom of Information Act, the Privacy Act, and the Commission's procedures for according appropriate confidentiality.

* * * * *

(d) *Requesting a Postal Service record.* The Commission maintains custody of records that are both Commission and Postal Service records. Except when the Postal Service submits materials to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A), in all other instances that the Postal Service submits materials to the Commission that the Postal Service reasonably believes to be exempt from public disclosure, the Postal Service shall follow the procedures described in part 3011, subpart B of this chapter.

(1) A request made pursuant to FOIA for Postal Service records shall be referred to the Postal Service; and

(2) A request made pursuant to part 3011 of this chapter for records designated as non-public by the Postal Service shall be considered under the applicable standards set forth in that part.

(e) *Requesting a record submitted by a person other than the Postal Service.* The Commission maintains records of a confidential nature submitted by persons other than the Postal Service as non-public materials.

(1) A request made pursuant to FOIA for records submitted by a person other than the Postal Service shall adhere to the applicable procedures of § 3006.35. If such a FOIA request is not referred to a different Federal agency pursuant to § 3006.35(b), the Commission shall consider it in light of all applicable exemptions and in accordance with the following procedures:

(i) If such materials are designated as non-public, the Commission shall follow the procedures appearing in § 3006.70(b)-(d) in determining the FOIA request; or

(ii) In all other instances, the Commission shall determine the FOIA request after notifying the person of the FOIA request and providing the person with an opportunity to respond within seven days of the date of the notice under the following circumstances:

(A) The records sought contain confidential commercial information that may be protected from disclosure under 5 U.S.C. 552(b)(4); and

(B) The Commission determines that it may be required to disclose the records, provided that at least one of the following applies:

(1) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under 5 U.S.C. 552(b)(4); or

(2) The Commission has a reason to believe that the requested information may be protected from disclosure under 5 U.S.C. 552(b)(4), but has not yet determined whether the information is protected from disclosure; and

(2) A request made pursuant to part 3011 of this chapter for records designated as non-public by a person other than the Postal Service shall be considered under the applicable standards set forth in that part.

3. Add § 3006.35 to read as follows:

§ 3006.35 Consultation, referral, and coordination.

(a) *Consultation.* If records originated with the Commission but contain within them information of significance to another Federal agency or office, the Commission will typically consult with that other entity prior to making a release determination.

(b) *Referral.* In addition to referring all requests made pursuant to FOIA for Postal Service records to the Postal Service as specified by § 3006.30(d)(1), if the Commission believes that a different Federal agency is best able to determine whether to disclose the record, the Commission will typically refer responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record is presumed to be the best agency to make the disclosure determination. Whenever the Commission refers any part of the responsibility for responding to a request to another agency, the Commission will notify the requester of the referral, including the name of the agency and that agency's FOIA contact information.

(c) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the Federal agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if the Commission locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the Commission will coordinate with the originating agency to seek its views on disclosure of the record. The Commission then will

notify the requester of the release determination for the record that is the subject of the coordination.

(d) *Classified information.* On receipt of any request involving classified information, the Commission will determine whether the information is currently and properly classified in accordance with applicable classification rules.

Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another agency under any applicable executive order concerning the classification of records, the Commission must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification. Whenever an agency's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), the Commission must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(e) *Timing of responses to consultations and referrals.* All consultations and referrals received by the Commission will be handled according to the date that the first agency received the perfected FOIA request.

(f) *Agreements regarding consultations and referrals.* The Commission may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

4. Amend § 3006.70 by revising paragraph (a) to read as follows:

§ 3006.70 Submission of non-public materials by a person other than the Postal Service.

(a) *Overlap with treatment of non-public materials.* Any person who submits materials to the Commission (submitter) that the submitter reasonably

believes to be exempt from public disclosure shall follow the procedures described in part 3011, subpart B of this chapter, except when the submitter submits materials to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A).

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PART 3011—NON-PUBLIC MATERIALS PROVIDED TO THE COMMISSION

5. The authority citation for part 3011 is revised to read as follows:

Authority: 39 U.S.C. 407, 503, 504.

6. Amend § 3011.100 by adding paragraph (c) to read as follows:

§ 3011.100 Applicability and scope.

* * * * *

(c) *Exemption.* Except for the circumstances described in paragraphs (c)(1) through (3) of this section, the rules in this part do not apply to any non-public materials (and the non-public information contained therein) provided to the Commission by any person in connection with activities under 39 U.S.C. 407(b)(2)(A).

(1) The following persons shall adhere to the requirements of § 3011.302 regarding the non-dissemination, use, and care of the non-public materials (and the non-public information contained therein) provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A).

(i) Members of the Commission;

(ii) Commission employees; and

(iii) Non-employees who have executed appropriate non-disclosure agreements (such as contractors, attorneys, or subject matter experts) assisting the Commission in carrying out its duties.

(2) Any person that discovers that non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) have been inadvertently included within materials that are accessible to the public shall follow the procedures of § 3011.205.

(3) Non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) are construed to exclude each of the following:

(i) Non-public materials provided by the Postal Service to the Commission pursuant to a subpoena issued in accordance with part 3013 of this chapter;

(ii) Non-public materials filed in response to an information request issued in accordance with § 3010.170 of this chapter;

(iii) Non-public materials filed in compliance with any applicable Postal Service reporting required under part 3050 or part 3055 of this chapter; and

(iv) Non-public materials filed in a Commission docket.

7. Amend § 3011.103 by revising paragraph (a) to read as follows:

§ 3011.103 Commission action to determine non-public treatment.

(a) The inadvertent failure of a submitter to concomitantly provide all documents required by § 3011.200(a) does not prevent the Commission from according appropriate confidentiality to non-public information contained with any materials provided to the Commission. Information requests as described in § 3010.170 of this chapter, preliminary notices, or interim orders may be issued to help the Commission determine the non-public treatment, if any, to be accorded to the materials claimed by any person to be non-public.

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